Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, & 15-191

Supreme Court, U.S.
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In The Supreme Court of the United States

DAVID A. ZUBIK, ET AL., *Petitioners,*
v.
SYLVIA BURWELL, ET AL., *Respondents.*

PRIESTS FOR LIFE, ET AL., *Petitioners,*
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.
Respondents.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL.,
Petitioners,
v.
SYLVIA BURWELL, ET AL., *Respondents.*

Additional Case Captions Listed on Inside Front Cover

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

BRIEF OF THE INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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EAST TEXAS BAPTIST UNIVERSITY, ET AL., *Petitioners,*

v.

SYLVIA BURWELL, ET AL., *Respondents.*

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL., *Petitioners,*

v.

SYLVIA BURWELL, ET AL., *Respondents.*

SOUTHERN NAZARENE UNIVERSITY, ET AL., *Petitioners,*

v.

SYLVIA BURWELL, ET AL., *Respondents.*

GENEVA COLLEGE, *Petitioner,*

v.

SYLVIA BURWELL, ET AL., *Respondents.*

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Government violates the Religious Freedom Restoration Act ("RFRA") by forcing objecting religious nonprofit organizations to comply with the Department of Health and Human Services ("HHS") contraceptive mandate under an alternative regulatory scheme that requires these organizations to act in violation of their sincerely held religious beliefs.

2. Whether the Government can satisfy RFRA's demanding test for overriding sincerely held religious objections in circumstances where the Government itself admits that overriding the religious objection may not fulfill its regulatory objective—namely, the provision of no-cost contraceptives to objectors' employees.

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INTERESTS OF THE *AMICUS CURIAE* [1]

The International Conference of Evangelical Chaplain Endorsers ("ICECE") is a conference of Christian evangelical chaplain endorsers, nonprofit organizations whose main purpose is to represent their member independent churches in endorsing chaplains to the military and other organizations requiring chaplains.[2] ICECE was organized specifically to identify, define, and address issues of importance to evangelical military chaplains and the military personnel they represent. ICECE's most important issue is the protection and advancement of religious liberty for all chaplains and military personnel.

The questions before this Court concern the reach and legality of the HHS Mandate (the

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[1] No counsel for any party on this brief in whole or in part, and no counsel or party made a contribution intended to fund the preparation or submission of this brief. No individual other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission.

[2] Endorsement is the process by which a DOD recognized religious organization certifies that its clergy or religious leader meet the required education, training and experience and is qualified to provide religious ministry to the endorsing agents military members; facilitate the free exercise of other military personnel, dependents and other authorized DOD personnel, and care for all service personnel. *See* DOD Instruction 1304.28 (describing endorsement process and criteria).

"Mandate") under the Patient Protection and Affordable Care Act of 2010 ("ACA"). Specifically, whether RFRA: (1) prevents the government from determining what actions required by the Mandate impose a significant burden on the practice of religion by religious nonprofit organization Petitioners; and (2) bars HHS from forcing Petitioners and nonprofit religious organizations to violate their conscience by complying with the Mandate's regulations requiring their participation in activities they deem immoral and/or forbidden.

This is an issue of great concern to ICECE because the Court's decision has great implications on the right of conscience and Free Exercise in the context of military service and will impact on military chaplains, the people of faith they represent and the military personnel they serve.

The issue from ICECE's perspective is whether the government, when dealing with religious organizations representing faiths operating in the public square, has the power to: decide what constitutes an insignificant burden on their religion; determine what is an insufficient matter of conscience such that religious organizations and persons must set their conscience aside to comply with regulations not based on a statutory or constitutional compelling government interest; and to punish those people of faith who refuse to comply with the government's interpretation of their faith and HHS's imposition of a government defined "politically correct" conscience.

In the context of the military environment in which ICECE's members operate, where orders are expected to be obeyed without question, the issue is

when and under what criteria government officials may determine for themselves what is not a significant burden on religion and override an individual's conscience.

ICECE'S SPECIAL CONCERNS

This case raises five areas of special concern for ICECE and its members. First, four Courts of Appeals, after recognizing the unquestioned burden facing Petitioners for noncompliance with the Mandate, substituted their own judgment as to whether violating their conscience was a serious matter or merely a minor administrative inconvenience. This is an unprecedented assumption of power the Constitution denies the judiciary. In doing so, those courts took sides in a theological dispute in violation of the Establishment and Free Exercise Clauses.

Second, the issues of conscience Petitioners raise are well-established and based on consistent historical, orthodox biblical Christian principles thousands of years old and whose foundations lie both in the words of Jesus Christ and in the Old Testament. Petitioners' beliefs are not outside the mainstream of historic orthodox Christianity. The lower courts' disregard of the moral impact on believers accruing from what the Bible calls "sin" amounts to hostility to historic orthodox Christian religion.

Third, those four Courts of Appeals seem to have gone out of their way to ignore the precedent of *Burwell v. Hobby Lobby Stores, Inc.*,134 S. Ct. 2751 (2014), despite its factual and legal similarity to this

case and *Hobby Lobby's* clear statement defining a burden on religion and the proper RFRA analysis. They ignored the obvious absurdity of HHS's arguments, the Mandate's many exceptions, and HHS's own admission complying with the "alleged alternative" would not satisfy its so-called "compelling purpose." Rather than reject HHS's attempt to force nonprofit religious organizations to knuckle under its mailed fist in violation of RFRA and rebuke the government for its shameless pursuit of Petitioners, the lower courts have become facilitators of tyranny.

Fourth, equally distressing, whether or not RFRA is a remedial statute, its history and words show it had a remedial purpose that must be honored, *Zipes v. TWA*, 455 U.S. 385, 398 (1982), and the judiciary's obligation and duty is to ensure RFRA's purposes are accomplished. One of RFRA's purposes was to bring the military's free exercise of religion under the protection of strict scrutiny. That these Courts of Appeals have ignored RFRA's remedial purposes puts at risk chaplains' or other military claims for protection under RFRA, one of the few legal options available to military personnel when free exercise is threatened or limited.

Fifth, the challenged decisions sever the link between conscience and free exercise, diminishing their interaction and conscience's restraining force on man's external actions. This is a dangerous concept for civilians and the military.

ICECE believes a conscience that honors the rule of law and the worth of the individual is an important product of the free exercise of religion and a compelling governmental interest. As shown

herein, our Founders recognized the free exercise of religion both supports and forms a mature conscience. Both sustain and support military personnel in the military profession's unique, challenging, and often dangerous environment.

Nurturing the spiritual aspect of an American military person's life is, in and of itself, a compelling governmental secular objective. JCS Joint Pub 1-05, Religious Ministry Support for Joint Operations, 1996, quoted Gen. George C. Marshal to emphasize the military's view of the importance of the soldier's "spiritual life" because it sustained the soldier in preforming his duty.

> I look upon the spiritual life of the soldiers as even more important than his physical equipment...the soldier's heart, the soldier's spirit, the soldier's soul are everything. Unless the soldier's soul sustains him, he cannot be relied upon and will fail himself and his commander and his country in the end. It's morale, and I mean morale, which wins the victory in the ultimate, and that type of morale can only come out of the religious fervor in his soul.

ICECE brings to the Court's attention the fact the common faith of these Petitioners is based on well-established and historic Biblical principles, is fully consistent and supportive of the principles upon which this Constitution is based, and in fact, is the same faith upon which the Constitution and its constitutional principles rest. Let us be clear, the

power at issue is the power to destroy ministry and free exercise in order to accomplish a political objective which is neither compelling nor mandated by any statute.

As explained herein, the heart of this issue is the meaning of "free exercise": is it merely something that takes place in the mind of the adherent or within the walls of the adherent's home or church, or does it encompass conscience, the application of those faith principles to the way an adherent lives? History and experience show the need for clear rejection of any suggestion the government has power to impose burdens on the free exercise of religion and thereby regulate conscience except in matters of the highest state interest which are not present here.

This answer has great and serious implications for the military, far beyond the facts and situations presented in the competing briefs. This Court has recognized the military is a special society which demands an obedience unknown by civilian society and to whom the judiciary grants great deference. *See Parker v. Levy*, 417 U.S. 733, 743-44 (1974); *Chapell v. Wallace*, 462 U.S. 296, 299-301 (1983). That obedience is critically important for the nation because the military, by its very nature, controls unprecedented instruments of power and destruction. Respect for the rule of law and a well-formed conscience are necessary to restrict and restrain the use of those instruments of power and the human tendency for self-aggrandizement and self-interest. If the government can usurp the role of religion in becoming the ultimate referee of what is right and wrong, and therefore define the only acceptable standard for conscience or matters of

conscience, the Constitution has become a sham and the Court invites the military to become instruments of tyranny to replace the rule of law established on religion and conscience.

All parties have consented to the filing of *amicus* briefs.

STATUTORY PROVISIONS

The relevant provisions of the Religious Freedom Restoration Act of 1993, the Patient Protection and Affordable Care Act of 2010, and the relevant regulations implementing the latter are reproduced in Appendix E to Petition No. 15-105.

SUMMARY OF ARGUMENT

I. Four Courts of Appeals' decisions addressing whether the Mandate significantly burdens Petitioners free exercise of religion are before the Court. Their common characteristic is they ignored binding precedent in determining whether a government practice burdens a person's free exercise of religion. Precedent is well-established neither the courts nor the executive can evaluate whether the government's imposition of a requirement, action or response significantly burdens a person's religion because it is contrary to that person's sincerely held beliefs. *Burwell* recently affirmed that principle and rejected the contrary arguments embraced by the courts below.

Notwithstanding *Hobby Lobby* and other well-established precedent and the unquestioned sincerity of Petitioners' beliefs, the Courts of Appeals assumed

a power the Constitution denies the judiciary. They evaluated the merits of Petitioners' claim that compliance with the Mandate's procedures burdened their religion because doing so violated their conscience and their religion's core principles. The courts found there was no burden. This raises serious concern for these Amici because it eviscerates RFRA, an important protection for ICECE's members and chaplains, and eliminates free exercise.

II. Respondents' attempt to force Petitioners to facilitate what Petitioners' religion considers morally repugnant procedures and practices through the use of Petitioners' insurance plans is an attack on Petitioners' freedom of conscience and their free exercise of religion. The Constitution delegated only limited powers to the federal government.

The purpose of the Bill of Rights was to ensure the government did not usurp for itself the power to establish, regulate or hinder religion, or violate other well-known individual rights that were the heritage of Englishmen. Among these rights was the right to conscience, an integral component of freedom of religion. The Founders emphasized the importance of religion in forming a conscience, a necessary force for a civil and prosperous society.

The Constitution rejected the concept of "toleration" and embraced religious liberty. An essential part of that liberty is the right to form one's conscience free of government interference or mandates. The Mandate, which is not required by statute, attacks both the right of conscience and free exercise.

III. The Mandate is the government's assertion it can define conscience, which part of a person's religious beliefs are important and which are inconsequential, and therefor what is a significant burden of religion. This is tyranny. Free exercise is the ability to practice one's Faith in every aspect of a person's life, including the public square and in business type interactions with other citizens, institutions and the government. The Mandate seeks to limit free exercise to what takes place only in a church, home, or in the individual's mind. This is destructive of our society because it corrupts conscience and destroys religious liberty, replacing it with toleration which undermines the very foundations of the Constitution.

ARGUMENT

I. THE COURTS OF APPEALS IGNORED BINDING PRECEDENT AND FAILED TO PROTECT THE FREE EXERCISE OF RELIGION

A. Courts Have No Authority to Determine When a Government Mandate Substantially Burdens Sincerely Held Religious Beliefs and Conscience May Be Ordered Silent

The record shows the Courts of Appeals recognized Petitioners sincerely held beliefs but then concluded complying with the Mandate did not

violate their conscience or severely burden those beliefs.

The Third Circuit in No. 14-1418 (*Zubik*) held complying with the mandate did "not make [Petitioners] 'complicit' in the provision of contraceptive coverage." *Zubik* Pet.App.36a. The Third Circuit found no substantial burden and no burden at all on Geneva's religious exercise because the regulatory mechanism (1) did not have the "effect" of "mak[ing] [Geneva] complicit in the provision of objected-to services", No. 15-191 Pet.App.34a; and (2) "participating" in the Mandate's compliance regulatory mechanism produced "no role whatsoever in the provision of the objected-to contraceptive services." No. 15-191 Pet.App.36a.

The Fifth Circuit found the Mandate's administrative requirement imposed no "substantial burden" on Petitioners' exercise of religion because their belief the regulatory compliance mechanism forced them to "facilitat[e] access to contraceptives" was wrong. No. 15-35 Pet.App.5a, 18a.

The Tenth Circuit acknowledged the petitioners sincerely believed compliance with the regulatory mechanism would make them "complicit in providing contraceptive coverage" in violation of their religion. No. 15-105 Pet.App.48a n.20. That court then "assesse[d] and ultimately reject[ed] the merits of" those sincere religious beliefs and found no substantial burden because complying via the regulatory mechanism would *not* render the religious employers morally complicit in providing contraceptive coverage as a matter of law. No. 15-105 Pet.App.48a.

The D.C. Circuit rejected all of Petitioners' claims in No. 14-1453 and14-1505 (RCAW), *RCAW* Pet.App.93a. The court found no substantial burden on Petitioners' religious exercise because the regulations "impose[] [only] a *de minimis* requirement" to submit "a single sheet of paper." *RCAW* Pet.App.34a. The court found the actions the Mandate required of Petitioners "do not," in fact, "facilitate contraceptive coverage." *RCAW* Pet.App.42a. The court also held that the regulations would survive strict scrutiny, despite the Government's contrary concession in light of circuit precedent. *RCAW* Pet.App 117a.

These decisions result from an unprecedented assumption of power the Establishment Clause denies the government, including the judiciary, contrary to well established and consistent precedent.

Thomas v. Review Bd., 450 U.S. 707, 715-716 (1981), rejected the argument the Courts of Appeals embraced here that courts could evaluate the sincerity and objectivity of a person's belief and determine if a challenged requirement or behavior violated that belief, imposing a substantial burden on the person's religion. Thomas, a Seventh Day Adventist, worked in a steel plant. When his roll section was shut down, he was moved to another group that made tank turrets. He asked for transfer because his religion forbade participation in making instruments of war. He quit because the plant had no other suitable job. *Id.* at 709. The Unemployment Board rejected his compensation claim that he lost his job because of his religion, and the state court affirmed. *Id.*

The Board and the state court found inconsistencies between Thomas's acceptable work in a steel mill and his religious objection to working on tank turrets, and relied on the fact some Adventists did not object to working on armaments such as tanks. *Id.* at 715. The Supreme Court reversed.

> We see ... that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

Id.

Thomas firmly rejected the argument judges could evaluate competing views of theology. "Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses." *Id.* at 715. *Thomas* also rejected the Courts of Appeals' actions here, evaluating whether an order to perform an action or task violated sincerely held religious belief and thereby burdened the claimant's free exercise.

> Particularly in this sensitive area [of determining sincerely held beliefs], it is not within the judicial function and

> judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. **Courts are not arbiters of scriptural interpretation.**

Id. at 716.(emphasis added)

Thomas also rejected the lower court's finding "the burden upon religion here is only the indirect consequence of public welfare legislation" and not a burden on religion. *Id.* ("A similar argument was made and rejected in *Sherbert [v. Vernier*, 374 U.S. 398 (1963)"]). The lower courts here embraced what *Sherbert* and *Thomas* rejected.

Hobby Lobby also rejected the same argument and process the Courts of Appeals used here to find the Mandate's compliance mechanism imposed no substantial burden on those petitioners' free exercise of religion. *Hobby Lobby* and co-petitioner *Conestoga Wood Specialties* argued providing coverage for abortifacients as required by the Mandate violated their sincerely held religious beliefs. *Id.* at 2778 ("This belief implicates a difficult and important question of religion and moral philosophy, namely the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.") That is the same issue before this Court in this case.

The Supreme Court agreed the *Hobby Lobby* petitioners stated a valid RFRA claim and rejected the argument courts could make those decisions. "[I]t

is not for us to say that their religious beliefs are mistaken or insubstantial." *Id.* at 2779. The judiciary's "narrow function...in this context is to determine whether the line drawn reflects an honest conviction[.]" *Id.* (quoting *Thomas*, 450 U.S. at 715). Nothing in the record shows Petitioners' opposition is not an honest religious conviction.

Thomas recognized a **narrow** class of free exercise claims did not deserve protection: "an asserted claim so bizarre, so clearly nonreligious and motivation is not to be entitled to protection under the Free Exercise Clause" *Thomas,* 450 at 715. Just as in *Thomas,* that is not the case here.

Petitioners' historic orthodox Christian faith's objection to abortion because it violates God's law and therefor is sin is not a new religious doctrine or set of beliefs. The leaders of major Christian denominations have a long record of objecting to abortion. That some religious persons may not find the Mandate oppressive and contrary to their core religious beliefs does not allow the Courts of Appeals to take sides in theological or religious disputes. "Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses." *Thomas*, 450 U.S. 715-716 (1981); *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another"). Courts have no authority to find compliance with the Mandate in some manner does not facilitate abortion and violate God's law.

B. The Courts of Appeals Ignored Binding Precedent

Two precedents speak clearly to the issues here and should have controlled the Courts of Appeals' decisions, *Thomas, op cit.*, and *Hobby Lobby, op cit.* It seems the Courts of Appeals went out of their ways to avoid *Hobby Lobby's* clear precedent, holdings, findings and principles. *Hobby Lobby* held the HHS cannot force its Mandate on for-profit companies that objected on religious grounds to providing their employees the same abortifacients to which these Petitioners object.

Despite *Hobby Lobby's* clear command, "it is not for us to say that their religious beliefs are mistaken or insubstantial", 134 S. Ct. at 2779, the four Courts of Appeals ignored its analysis and findings by assuming the Petitioners were lying or misinformed about the burden the Mandate placed on their religious beliefs. Those courts then substituted their own evaluation whether the Mandate's procedures significantly burdened Petitioners' sincerely held beliefs. To find the objecting nonprofit religious organizations here can be forced to obey the Mandate while churches and for-profit companies are excused for religious grounds, and millions are excused for a variety of non-religious reasons is an absurdity. The Court's oft cited "objective observer" who understands *Hobby Lobby* and *Thomas* could easily conclude the circumstances and facts suggest the Courts of Appeals were hostile to these Petitioners' religious faith. ICECE is greatly concerned about that

perception and the deference given to HHS's badly flawed arguments.

II. THE HHS MANDATE IS A DIRECT ATTACK ON FREEDOM OF CONSCIENCE AND MEANINGFUL FREE EXERCISE

The HHS Mandate's efforts to force the Little Sisters of the Poor and other religious individuals and non-profit organizations to violate their consciences under force of law is an effort to force the Secretary's own fervently held beliefs upon Petitioners' consciences. Absent some compelling purpose which the record fails to disclose, this is unconstitutional. The HHS Mandate is hostile to religion and seeks to replace liberty with toleration, a concept the Constitution rejected.

A. The Constitution's History Shows Conscience Was a Critical Element of its Structure and the Foundation of Liberty

The Constitution did not exist when the Continental Army and Navy battled Great Britain, then the Superpower of the world, to create the United States. They fought for the rights England denied them, rights guaranteed by the Magna Carta, the English Bill of Rights,[3] and England's unwritten

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3. Act of Parliament, December 16, 1689, *see West's Encyclopedia of American Law, edition 2*. S.v. "English Bill

constitution Sir William Blackstone defined in his Commentaries on the English Law. Those rights can be seen in the Declaration of Independence's list of grievances that correspond with Blackstone's list of all Englishmen's rights. The Declaration defined and summarized those rights in a unique American perspective based on a Christian view, "unalienable rights" endowed by their Creator, including "life, liberty and the pursuit of happiness" [4]

Inclusion of a Bill of Rights patterned after the English Bill of Rights was a condition for the ratification of the Constitution in 1789. America's military and citizenry understood the Constitution was a covenant between the States and the people establishing a Federal government of limited powers. The Bill of Rights clearly articulated non-negotiable rights which the government was to guarantee and not restrict except for the most compelling reasons.

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of Rights." Retrieved at http://legal-dictionary.thefreedictionary. com/English+Bill+of+Rights

4. The Declarations' famous words, "That all men are created equal, that they are endowed by their Creator with certain unalienable rights" rests on Genesis 1:26-27 account of creation: "and then God said, "Let us make man in our image....So God created man in his own image, in the image of God he created him; male and female he created them." Because God did not distinguish among men in his creation, he made them equal; our unalienable rights attach because they come from the Creator who made us in His image and man cannot take them.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

This Court has linked the right of conscious as inherent in the First Amendment's rights and guarantees. *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989) ("It is settled law that no government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience"); *Lee v. Weisman*, 505 U.S. 577, 591 (1992) ("The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment"); *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Stewart, J., concurring) ("The harm is the interference with the individual's scruples or conscience -- an important area of privacy which the First Amendment fences off from government").

The classical Greek understanding of "conscience" referred to knowledge, not simply a knowledge of facts, but a knowledge of one's own history (reflexive knowledge), which involved

"evaluations and judgments about the criterion of good and evil." Colin Brown, "Conscience" 348, *The New International Dictionary of the New Testament*, Vol. 1. (H. C. Hahn ed., Zondervan Publishing Co. 1975).

> Conscience is the moral sense; the faculty of judging the moral qualities of actions, or of discriminating between right and wrong; particularly applied to one's perception judgment of the moral qualities of his own conduct, but in a wider sense denoting a similar application of the standards of morality to the acts of others. The sense of right and wrong inherent in every person by virtue of his existence as a social entity[.]

Black's Law Dictionary 159 (Abridged. 5th ed. 1983).

Conscience is inextricably linked to morality, right and wrong, good and evil. It is an internal alarm system that warns when questionable decisions are being considered or made and sounds off loudly when one becomes involved in actions inconsistent with one's core beliefs. Its role is to encourage superior or non-destructive behaviors, thereby protecting individuals, couples, families, communities and a nation from decisions and actions that cause harm while it compels each individual or group toward decisions and actions producing positive outcomes. The conscience "convicts, reproves

and exposes"[5] inferior or destructive behaviors, offering a person the opportunity to change one's mind in order to learn from or avoid negative and harmful consequences. The Framers knew conscience was intended to be an innate and essential ally in the human struggle to live with oneself and others securely, peacefully and profitably. They wanted a good and clear functioning conscience to be the alarm system and safety-net for a civil and prosperous society and its citizens' quest for a fulfilling life with liberty and happiness.

James Madison emphasized freedom of conscience in discussions with members of the General Assembly over giving the Anglican Church in Virginia a preferred legal status over other denominations, among them the Baptist, Mennonites, and Quakers. Those denominations also lived in Virginia and had already endured religious persecution from the larger Anglican community, such as not being able to preach without permission. Madison feared using the force of law to establish one denomination over another would intensify religious conflicts. The idea that persons of faith would influence and participate in a republican government was a given, but he and others wanted that participation without religious conflict, favoritism or division that would underline the unity of a common effort and exercise of liberty. The Signers of the Declaration, despite their different faiths, had worked in a unity of spirit respecting

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[5] H. C. Hahn, On the Understanding of Conscience by Philo, 349

their religious differences while acknowledging and jointly appealing to "Nature's God" and "the protection of divine Providence."

Madison penned his June 20, 1785, *Memorial and Remonstrance Against Religious Assessments* to plead against legislating conscience, *i.e.*, individual core beliefs, the inevitable result of establishing a state church. Madison's treatise provided fifteen reasons not to use the force of law to give any religion existence or credibility.

Madison believed each individual comes into the world as a free and independent person with natural rights that are not to be abridged. Therefore, government's role is to keep each person in this state of being by not enacting legislation that dictates or mandates core religious (which would include atheist, agnostic, or secularist) beliefs, but rather protects the freedom of conscience as each free person lives in the context of every others person's right to life, liberty, and the pursuit of happiness.

The Declaration of Independence and the Bill of Rights were meant to be the barriers protecting and defending freedom of conscience, providing the best framework within for a nation to organize in order to pursue and develop a civil, peaceful and prosperous society. Any government that is guilty of encroachment upon these basic rights "exceed[s] the commission from which [it] derive[s] [its] authority, and are tyrants. The people who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves." James Madison, *Memorial and Remonstrance Against Religious Assessments*, 30-31, Writings (The Library of America, 1999).

Thomas Jefferson reflected on the negative effect of government coercion in matters of conscience; it "makes one half the world fools" for thinking that government can resolve issues of conscience and create a civil society by force of law, "and the other half hypocrites" because they are forced to live in a manner contrary to the dictates of conscience. No matter the religion or philosophy one espouses, if it is favored or disfavored by force of law, "millions of innocent men, women, and children, since the introduction of [enter whatever religion/philosophy you want], have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch toward uniformity" Thomas Jefferson, *Jefferson: Writings*, 286, in Notes on the State of Virginia (The Library of America, 1984).

Madison recognized the legal establishment of Christianity had been unproductive. "What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry, and persecution." Madison, Writings 32. Without a free and active conscience in a society, beliefs and their adherents eventually become corrupted and dangerous to civil society. Conscience, the still small internal voice, freely expressed among a multitude, has the power to prevent, adjust, or abolish what would otherwise become disastrous courses of action. The common thread that links religions and secular philosophies with tyranny, torment, and terror is the suppression of matters of conscience by force of law. Establishment of one core set of beliefs by law usually results in the suppression of others, as HHS seeks to do here through its Mandate.

B. America's Civil Society Needs a Conscience to Function

A functioning and productive society requires a balanced relationship between law and conscience. Our constitutional society requires law to give deference to conscience. Madison's first argument against using the force of law to grant the Anglican tradition superiority over others explained the dictates of conscience must be free from the forces of law and one's conscience must not be granted legal authority over another's conscience. If a conscience is to be persuaded in another direction, it must be swayed by intellectual argument and/or by the consistencies and values emanating from another's conscience, *i.e.*, core beliefs in action.

> It is a fundamental and undeniable truth 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man, and it is the right of every man to exercise it as these may dictate. This right is in its nature *an unalienable right*. It is unalienable, because the opinions of men depending only on the evidence contemplated by their own minds cannot follow the dictates of other men. It is unalienable also, because what is here a right towards men, is a duty towards the

> Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. *The duty is precedent*, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe. And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that *Religion is wholly exempt* from its cognizance"

James Madison, Memorial and Remonstrance against Religious Assessment, *Writings* 30 (Emphases added).

The founding generation's desire was to resolve a millenniums old human struggle with tyranny and violence by creating what the Newport, RI, Jewish community would describe as a nation which "to bigotry gives no sanction and to persecution no assistance—but generously affording to all liberty of conscience, and immunities of citizenship—deeming everyone, of whatever nation,

tongue, or language equal parts of the great governmental machine." Character Counts, Leadership Qualities in Washington, Wilberforce, Lincoln, and Solzhenitsyn, 58 (Os Guinness, ed., Baker Books, 1999). President George Washington's response (quoted later) to this letter concurred wholeheartedly.

The consequence of diminishing conscience by the force of law is the gradual fleecing of republican democracy until freedom is lost. Some form of totalitarianism will take root and eventually be established because it is conscience that protects liberty. Understanding the future possibility of this undesired fate, the Founding generation provided the spawning nation with three unalienable principles in the form of unalienable God-given rights to all to form the foundation upon which a prosperous, productive civil society would be built: life, liberty, and the pursuit of happiness.

The Declaration of Independence laid these principles out before the American people, not only as a reason to sever the historic bond with their mother nation, but to establish the standard by which their new nation would be formed and given the opportunity to survive. The framers of the Declaration of Independence and the United States Constitution did not believe God-given and, therefore, unalienable rights were safe simply because the first American generation established them. They created the framework to provide both the means and incentives to protect life, liberty, and the pursuits that spring from one's own beliefs, talents and gifts. That relied on protecting its citizens' conscience in a manner to keep it from being

victimized or silenced. Either case would result in favoritism replacing justice with incivility and oppression of every kind replacing righteousness.

An effective conscience was necessary to ensure politicians and judges respected human rights and were servants of the people, and the people insisted on respect for their rights and honest government. The alternative result flowing from a lack of conscience is rule by ideological elites through edicts, purveyors of oppression, and consumers of property and wealth while the people over whom the new elites rule live lives legally forced into hypocrisy.

C. The Mandate Seeks To Replace Religious Liberty with Toleration as the Rule of Law

The constitutional structure founded on unalienable rights that shaped America is incompatible with totalitarianism, fascism, communism, socialism and radical Islam. These cannot survive in an environment that respects all human life, freedom of thought and the innovation and creativity of the human spirit because these essential distinctive qualities must be repressed for the sake of the philosophy and ideology. These repressive "isms" cannot allow free conscience, but depend upon the destruction of competing values for their very existence and the maintenance of a cold, insensitive and dead conscience to preclude all challenges.

America's representative democracy, like any government system, must hold its citizens together with some unifying theme. That unifying theme is

"liberty" for all and rests on the three unalienable rights the Declaration of Independence proclaimed and which the War of Independence insured, establishing equality before the law for all. The Founders understood that the maintenance of those values depended upon a free conscience and the freedom to form that conscience through free speech and religion. The danger the Founders foresaw underlies this case because government seeks to replace and therefore squelch individual conscience with its own view of what is right and wrong, unhinged from historic religious or moral principles and reinforced by the force of law. Alexander Solzhenitsyn warned about this unhappy state and its consequences.

> There is a disaster, however, which has already been under way for quite some time. I am referring to the calamity of a despiritualized and irreligious humanistic consciousness. To such consciousness, man is the touchstone in judging everything on earth -- imperfect man, who is never free of pride, self-interest, envy, vanity, and dozens of other defects.

Alexander Solzhenitsyn, *A World Split Apart*, June 8,1978, 327th Harvard University Commencement Address.

The ultimate product of such a "despiritualized and irreligious" consciousness is a society where the norm for conduct becomes the crimes addressed by the Nürnberg and Tokyo War

Crimes Tribunals and illustrated by The Rape of Nanking, Auschwitz, the Katyn Forrest Massacre (Poland), Malmedy (Battle of Bulge), Me Lai (Vietnam), and Abu Grab (Iraq).

During contemplation of the free exercise of religion clause for the Virginia Constitution, James Madison helped in its final phrasing by addressing his concern of the use of the word "toleration", which he viewed as an impediment to the liberty of conscience. George Mason had suggested that the language read: "all men shou'd enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience." Ralph Ketcham, *James Madison: A Biography,* 72 (American Political Biography Press) (1971). Having been influenced by Thomas Paine, who believed that tolerance was nothing more than the imitation of intolerance, both being despotisms, Madison believed that "tolerance" was inherently a calculated offense deployed to belittle and threaten less influential faiths. Therefore, Madison worked to have the word stricken from the Constitution.

His rewrite, which was adopted and included in the Virginia Constitution, reads: "all men are created equally entitled to the full and free exercise of religion according to the dictates of Conscience; and therefore that no man or class of man ought, on account of religion to be invested with peculiar emoluments or privileges." *Id.* at 72. This meant that equal expressions of faith and the dictates of conscience could not be undermined by force of law. "The change is crucial because it made liberty of conscience a substantive right, the unalienable privilege of all men equally, rather than a disposition

conferred as privilege by established authorities." *Id.* at 73. Religious beliefs were not to be "put up with" or tolerated – they are the equal expressions of conscience by equal and free men, one not better than another. Though the expressions of a free conscience may not be equal in value or be accepted by the majority, they are, nonetheless, able to be held and practiced privately and within one's own "conscience group," without the force of law either pro or con, and welcomed in the public square where they can be debated and accepted or rejected by others.

The Mandate's history is a perfect example of toleration at work. HHS established a standard of orthodoxy that was supposed to apply to all citizens and all businesses but then granted numerous exemptions for a variety of reasons. Whether the exemptions are based on party loyalty, paybacks for election or legislative support, favoritism or the mere whim of Executive Branch officials, the result is the same. The HHS tolerates some groups, *i.e.*, his favorites such as supporting labor unions, and finds Hobby Lobby, Conestoga Wood Specialties, the Little Sisters of the Poor, Geneva College, and other Petitioners intolerable, disfavored enemies because they hold dearly to traditional and historic Christian religious views. HHS requires those who are disfavored because their religious beliefs control their actions to adhere to the Secretary of HHS's standard enforced with draconian fines and penalties that threaten the existence of these not-for profit religious organizations and those they support and employ. This is rule by tyrants.

D. The Mandate Is a Direct Attack on Free Conscience and Meaningful Free Exercise

The above discussion shows that conscience and free exercise were inseparable. Religion was supposed to inform the conscience and the conscious was supposed to direct the individual's actions in conformity with what it knew to be right or wrong. Both were essential to the preservation and exercise of liberty.

The Framers recognized one indispensable and revealing caveat to the liberty promised under our Constitution — ideas, whether religious or secular, should not be permitted to endanger the "preservation of equal liberty or the existence of the State." Ketcham, *Id.* at. 72 (quoting Madison). Those philosophies/faiths which reject the requisite principle that all men are equal and free to live by the dictates of a conscience, are a clear and present danger to the Republic, and therefore should *not be tolerated by the government,* especially the judiciary, which is constitutionally empowered to protect the unalienable rights of its citizens.

George Washington echoed James Madison's concern over the use of the word "tolerance" and the the important role of conscience in a statement he delivered to the Newport, RI, Jewish community.

> All [the citizens of the United States] possess alike liberty of conscience and immunities of citizenship. *It is now no more that toleration is spoken of, as if it was by the indulgence of one class of*

> *people, that another enjoyed the exercise of their own natural rights*. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection demean themselves as good citizens, in *giving it on all occasions* their effectual support

Os Guinness, 59, (emphases added).

The Court must not tolerate the claim by another branch of the government to rule in a way that threatens America's citizenry's natural and protected rights. The HHS Mandate, in effect, rejects the underlying principle of God-given unalienable rights the Declaration of Independence espoused, and assumes for itself a power the Constitution does not, by its words, history or spirit, grant to any official or branch of government. *See Barnette, op. cit.*

The HHS Mandate assumes for itself the right to establish the standard for conscience hostile to religion and those who respect life. The HHS Mandate does not enhance liberty but crushes, if not kills, it by substituting HHS's conscience for that of Petitioners and their members, without clear congressional authorization to violate the religious liberty principle that was a prerequisite to the Bill of Rights and the precondition for ratification of the Constitution.

As shown in section I above, the "free exercise" of religion meant that the dictates of conscience, as formed by religious principles, were to be expressed in the lives of ordinary citizens. The HHS Mandate

seeks to eliminate the word "free" as a description of *religious* "exercise" from the Constitution, replacing it with "private exercise" whose scope has yet to be determined, as an exercise of toleration by some government official. It seeks the Court's approval of this constitutional change rather than seek it through Article V This is anathema to America's history, culture, and vision.

A mature conscience is vital for the continued protection of life, liberty, and the pursuit of happiness. It is a morally sensitive and necessary component of every human being if he or she is to be spiritually, emotionally and physically productive in life and genuinely free from human nature's natural inclination to despise moral authority. When conscience is denied expression or squelched by government fiat as HHS seeks to do here, it remains or becomes immature and is, therefore, unable to protect as divinely intended. This case illustrates that once government legislatively creates its own standard for conscience, bigotry and persecution follow. To survive as a vital constitutional democracy in a world of disparate thought, *freedom of conscience must be protected*. The HHS Mandate must be rejected as exceeding the Constitution's grant of authority.

III. THE UNCHECKED AUTHORITY TO DEFINE A CORRECT CONSCIENCE AND RESTRICT FREE EXERCISE RIGHTS IS UNCONSTITUTIONAL TYRANNY

A. Free Exercise Means the Ability to Practice One's Faith Without Coercive Restriction

Inherent in the government's argument are two dangerous concepts. The first is "free exercise" does not mean free exercise as that term has historically been known and understood. Rather, it now means the actual exercise or practice of one's faith in everyday life is not free but subject to government control and sanction.

Second is the concept that a citizen can disregard what his religion tells him he should not do in his everyday life in the workplace. The government argues devout Christians should now stifle their conscience when it conflicts with the government's determination of what is **now** right and wrong, even if the forced activities defining what is now "right" are not matters of national security or other well recognized compelling interests.

Such concepts would be unknown to the Founders who recognized that faith was intertwined with conscience and "exercise" meant that one lived in accord with what one believed. The Signers' of the Declaration of Independence affirmation of their "firm reliance on the protection of divine Providence" was not an exercise of mere civic religion, ceremonial Deism or a gratuitous statement for publicity purposes. When they signed their names, America

had a ragtag militia, not a professional Army; no Navy; no arms industry; no ready source of funds or friendly financial backers with deep pockets; and no international support. The Signers and the colonists they represented challenged Great Britain, the superpower of their day, who had a professional Army, a large Navy, and a Parliament willing to spend money, including hiring mercenaries, to suppress a rebellion by a bunch of upstarts who objected to having their rights as Englishmen violated and being treated as serfs.

The Signers and America's patriots could not have foreseen that a "divine fog" would save Gen. Washington and his Army after their defeat at the Battle of Long Island, or the French fleet would arrive at the Virginia Capes in time to keep the British Fleet from evacuating General Cornwallis and his army from Yorktown, VA. Their only source of hope was their faith in and knowledge of the Divine Creator whom they believed endowed them with the unalienable rights of life, liberty and the pursuit of happiness. Following their conscience, they objected to tyranny and trusted God would intervene and find a way for them to enjoy the blessings of liberty. When the war ended, the Signers and Americans were convinced "God intervened in the affairs of men" and did so on their behalf, as Ben Franklin reminded the Constitutional Convention. The Constitution's Preamble states it was ordained to "secure the blessings of liberty", a distinct recognition liberty was a God given gift.

Requiring Christians to violate their conscience and religious beliefs absent a narrow means to achieve a compelling purpose is clearly

unconstitutional and makes government hostile to religion, a violation of the Establishment Clause. Religious persons are presumed to follow the dictates and practices of their faith. To be a follower of Christ means there is no separation between what one believes as revealed in the Scriptures and the way one is to live out his or her life.

The teachings of Paul, John, and the other Apostles make it clear that Christians were to transform their thinking. They were to live lives in accordance with God's word, oppose the evil works of darkness and love both neighbor and enemy. Petitioners, the object of the government's wrath here, are attempting to live out their faith as many before them have done, while the Secretary and the lower courts are seeking to destroy Petitioners' ministry, calling and faith.

The Courts of Appeals have eliminated the meaning of both "free" and "exercise" from "free exercise" and removed conscience as a factor in controlling duty and behavior. This effectively redefines the free exercise of religion as only that which takes place inside a church or the privacy of one's mind or family. It is destructive because it eventually leads to an empty conscience where right and wrong have no difference, with tyranny and chaos the logical results.

B. Failure to Protect the Rights of Conscience and Free Exercise Is Destructive of Military and Civil Society

Conscience is particularly important in the military. Conscience provides the internal discipline which produces loyalty to the chain of command and the nation, and stability in the midst of great stress. Empty consciences are without moral restraint, they have produced the incidents cited in section II.B and illustrate the depravity man is capable of when the internal guides have been erased in support of some bureaucratic or political objective, or a destructive philosophy denying the individuality and uniqueness of man or his/her unalienable rights.

The ability to arbitrarily decide which laws to enforce and which to ignore have great implications for the military and its culture. ICECE's concern is where the government draws the line in terms of behavior, speech, and practices. If the government can exclude religion from the public square in the area of commerce and business, there is nothing to stop it from excluding free exercise in other areas, particularly in the military.

Congress's concern for the issue of conscience protection for both military chaplains and military personnel passed section 533 of the 2013 National Defense Authorization Act[6] (NDAA) and similar protections in section 532 of the 2014 NDAA. Numerous examples of threats to military religious

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[6] Title 10 Chapter 53

liberty abound. An Air Force officer was told to take a Bible off his office desk because it might "offend" someone. It is unusual for the display of a Bible to be contrary to good order and discipline. An article written by chaplain for a post newspaper was removed after an atheist complained he was offended; the article explained the origin of the phrase "no atheists in foxholes." *See* A Clear and Present Danger: The Threat to Religious Liberty in the Military, December 12, 2013, frc.org/clearpresentdanger (listing incidents involving threats to religious liberty in the military). An ICECE endorser member has had to address an incident of censorship of one of its chaplain's sermon by a senior chaplain and other attempts at discrimination due to faith and religious speech issues.

The fact the government can redefine the term "free exercise" and yet ask military to give their lives defending what could be an empty Bill of Rights undermines trust in the military's promises and missions, and confidence in the nation's military, civilian, and judicial leaders.

The military by nature engages in violent acts of destruction and places its personnel in situations which require not only discipline, but consciences reflective of the concept of ordered liberty enshrined in the Constitution. The nation has historically relied on men of conscience to do the right thing. It is in the national interests that conscience, which determines right and wrong, be reinforced and not abused so the power to destroy is always used under the control of authorized leaders acting under law.

It is a grave risk to the rule of law and order of society to adopt policies allowing and encouraging both military and civilian consciences to be dulled by validating laws and decisions forcing them to violate that conscience. The result for the military when conscience is dictated by the state and religion excluded as a source or reference are acts which resulted in men and women being labeled war criminals. It breeds only contempt for those who initiate and perpetrate such a system given our national history and culture.

CONCLUSION

The meaning and interaction of conscience and "free exercise" are at the heart of this case. Is free exercise merely something that takes place in the mind of the adherent or within the walls of the adherent's home or church, or does it encompass the application of those faith principles to the way an adherent lives and faith based organizations organize and operate? ICECE urges the court to (1) strike down the HHS Mandate because it violates the Constitution by restricting conscience and prohibiting the Free Exercise of religion; and (2) instruct the lower courts to follow RFRA precedent and not assume powers denied them.

Respectfully submitted,

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